

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL S. JORDAN

Claimant

VS.

PYLE CONSTRUCTION

Respondent

AND

CONTINENTAL WESTERN CASUALTY

Insurance Carrier

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Docket No. 253,664

ORDER

Respondent appeals the March 13, 2002 Order of Administrative Law Judge Nelsonna Potts Barnes. Respondent contends the Administrative Law Judge erred in ordering penalties against respondent for an alleged late payment of temporary total disability benefits.

Claimant contends the penalties assessed by the Administrative Law Judge were too small and did not adequately cover all the weeks of temporary total for which respondent made late payments. The Appeals Board (Board) held oral argument on September 12, 2002.

APPEARANCES

Claimant appeared by his attorney, David H. Farris of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Nathan D. Burghart of Topeka, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record contained in the workers' compensation file for the purposes of this Order.

ISSUES

Did the Administrative Law Judge err in ordering penalties against respondent for alleged late payments of temporary total disability benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds that the Order of the Administrative Law Judge should be affirmed.

The Administrative Law Judge ordered respondent to pay temporary total benefits after a March 15, 2001 hearing. However, the actual date of the Order stemming from that hearing is March 29, 2001. On March 19, 2001, claimant issued a K.S.A. 44-512a demand letter to respondent, its attorney and its insurance carrier for payment of the temporary total disability benefits ordered by the Administrative Law Judge in the March 29 Order.

K.S.A. 44-512a (Furse 1993) allows civil penalties when compensation, which is unpaid and past due, is not paid in a timely fashion. The statute obligates that a written demand for payment setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due must be either personally or by registered mail delivered to the employer or the insurance carrier and its attorney of record. Respondent then has 20 days from the date of service of such demand to make payment or be assessed penalties. The statute allows for penalties of up to \$100 per week for each week any disability compensation is past due. In this instance, the Administrative Law Judge did not address claimant's request for penalties for temporary total disability compensation ordered before March 15, 2001, and not paid. The parties in their argument to the Board, made no request for a remand. The Board will, therefore, also consider that matter and make a determination.

When dealing with a statutory demand under K.S.A. 44-512a (Furse 1993), the demand "can only be effective for compensation awarded the claimant then due and unpaid."¹ In this instance, the demand letter set out by claimant preceded the Judge's Order by 10 days. Claimant's attorney argued that the Order was given verbally at the end of the March 15, 2001 hearing. However, a review of the transcript from that hearing fails to indicate that the Administrative Law Judge made any such order. As the demand under K.S.A. 44-512a (Furse 1993) was premature and, therefore, not effective, the Board finds that claimant is not entitled to any penalties as a result of the March 19, 2001 demand letter.

¹ *Hallmark v. Dalton Construction Co.*, 206 Kan. 159, 476 P.2d 221 (1970).

After the Administrative Law Judge ordered temporary total disability compensation, respondent referred claimant for an independent medical examination to Philip R. Mills, M.D. Dr. Mills, in his May 2, 2001 report, found that claimant had reached maximum medical improvement and was no longer temporarily disabled. Respondent immediately stopped temporary total disability compensation and requested a hearing before the Judge to terminate temporary total disability compensation. The Judge, at the June 26, 2001 hearing, ordered that temporary total was to be continued pursuant to the original Order. On June 27, the day after that hearing and Order, claimant again served a demand letter for temporary total disability compensation on respondent. This K.S.A. 44-512a (Furse 1993) demand letter was received by respondent and its attorney on June 28, 2001.

On July 16, 2001, respondent caused a check to be issued in favor of the claimant for the full amount of the temporary total disability compensation past due. This check was sent to claimant via U.S. mail.

On July 24, 2001, the matter came before the Administrative Law Judge for consideration of claimant's penalty requests. Unknown to claimant's attorney, the check had arrived in claimant's possession sometime after July 16, 2001, and was negotiated on July 20, 2001.

The 20-day time limit under K.S.A. 44-512a (Furse 1993) from claimant's June 27, 2001 demand letter would have run on July 18, 2001. There is no evidence in the record to determine whether claimant received the check from respondent on July 18, July 19 or July 20. The only evidence is that on July 20, claimant had the check in his possession and was able to negotiate the check at that time.

"[U]nder Section 44-512a it is the employer, not the employee, who is responsible for the passage of time within which to pay the accrued compensation and avoid the statutory acceleration."²

"The employer has the burden of avoiding the effects following the 44-512a demand"³

The Board acknowledges respondent's check was issued within the 20 days required under K.S.A. 44-512a (Furse 1993). However, K.S.A. 44-512a (Furse 1993) requires that payment must be made within 20 days from the date of service of the demand. There is nothing in the Workers Compensation Act which allows the mailing of the check to constitute the making of payment. The Board concludes rather that it is the

² *Ryder v. Reagor*, 213 Kan. 576, 516 P.2d 990 (1973).

³ *Ryder*, at 579 (citing *Miller v. Massman Construction Co.*, 171 Kan. 713, 237 P.2d 373 (1951)).

receipt of the money which constitutes payment in this instance. As it is the respondent's burden to prove the date of payment to avoid the effects of K.S.A. 44-512a (Furse 1993),⁴ the Board finds respondent has failed in its burden of proving the payment of the temporary total disability compensation was actually made to claimant within 20 days of the demand. The Board, therefore, finds that the penalties assessed by the Administrative Law Judge in the March 13, 2002 Order are appropriate and are affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 13, 2002, from the July 24, 2001 hearing, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation

⁴ *Ryder*, at 579.